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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	R.06-10-005

RESPONSE OF SUREWEST TELEVIDEO (U 6324 C) TO APPLICATIONS FOR REHEARING

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I. INTRODUCTION.

Pursuant to Rule 16.1(d) of the Commission's Rules of Practice and Procedure, SureWest TeleVideo ("SWT") provides this response to the Applications for Rehearing filed on April 4, 2007 by The Utility Reform Network ("TURN") and The Greenlining Institute ("Greenlining").[1]

TURN'S Application raises three alleged legal errors associated with D.07-03-014, the Commission's decision implementing the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). Those three issues are: 1) the lack of detailed reporting requirements to ensure franchisees comply with Public Utilities Code Section 5940; 2) the prohibition of protests of franchise applications; and 3) the unavailability of intervenor compensation for the participation in Commission proceedings related to the video franchise process. Greenlining's Application only raises the latter two issues.

As discussed in more detail below, D.07-03-014 is consistent with applicable statutory requirements and reflects appropriate use of the Commission's discretion to implement the provisions of DIVCA. TURN and Greenlining have failed to demonstrate any legal error that would prompt the Commission to rehear its implementation of DIVCA.

II. STANDARD OF REVIEW.

Perhaps not unsurprisingly given their unsubstantiated claims of legal error, neither TURN nor Greenlining outline in their Applications the appropriate legal standard for determining whether the Commission has committed legal error in a decision it adopts. SWT takes this opportunity to set forth the framework under which the Applications must be evaluated.

An application for rehearing must set forth specifically the grounds on which a Commission decision is alleged to be unlawful or erroneous.[2] At a minimum, any regulation adopted by a state agency must be within the scope of authority conferred by the applicable

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[1] SWT also received Applications for Rehearing filed by the City of Oakland and the City of Carlsbad. This response does not address those Applications for Rehearing.

[2] Rule 16.1(c), Commission Rules of Practice and Procedure; Cal. Public Util. Code § 1732

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statutory framework.[3] A regulation adopted pursuant to the terms of a statute must be consistent and not in conflict with that statute.[4] The regulation must also be reasonably necessary to effectuate the purpose of the statute.[5]

Based on these fundamental principles, a state agency is frequently faced with interpreting statutes when adopting regulations. The goal of statutory interpretation is to "determine and effectuate legislative intent."[6] Intent is discerned first from "the words of the statute, giving them their usual and ordinary meaning."[7] Further, a statute must be given a reasonable and common sense construction.[8]

In the absence of an express legislative command, the decision whether administrative regulations are necessary or appropriate is a matter entrusted to the discretion of the administrative agency.[9] In determining whether a regulation is necessary, the court will defer to the agency's expertise and will not superimpose its own policy judgment in the absence of an arbitrary and capricious decision.[10]

III. THE COMMISSION HAS NOT COMMITTED LEGAL ERROR.

Although neither Application specifies with particularity the alleged legal error of any of the three Commission determinations challenged in the Applications, there appears to be two separate allegations of legal deficiency that permeate the Applications. First, TURN and Greenlining appear to contend that the Commission has failed to adopt regulations where it should

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[3] Cal. Gov. Code § 11342.1.

[4] Cal. Gov. Code § 11342.2.

[5] *Id.*

[6] *Pacific Gas & Electric Co. v. Public Utilities Com.*, 85 Cal.App.4th 86, 92 (2000).

[7] *Id.*

[8] *City of Costa Mesa v. McKenzie*, 30 Cal.App.3d 763, 770 (1973).

[9] *Alfaro v. Terhune*, 98 Cal.App.4th 492, 503 (2002), *rehear. den., rev. den., cert. den.*, 537 U.S. 1136 (2003).

[10] *Coalition for Reasonable Regulation of Naturally Occurring Substances v. California Air Resources Bd.*, 122 Cal.App.4th 1249, 1263-64 (2004) *modified on den. of rehear.*

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have. Second, TURN and Greenlining contend that the Commission's adopted rule is inconsistent with the statutory requirements of DIVCA. Either one or both of these criticisms is raised in the context of the three rules that are challenged. The discussion that follows shows that the Commission has met applicable legal standards with respect to each of the three determinations challenged in the Applications.

A. No Regulations are Needed to Implement Section 5940.

TURN contends that D.07-03-014 commits legal error by declining to adopt regulations establishing reporting requirements related to the prohibition adopted in Section 5940. TURN is incorrect.

First, TURN obfuscates the legal analysis by claiming that Section 5940 prohibits cross-subsidization generally and that the Commission should, therefore, require companies to submit highly detailed and disaggregated data. A review of Section 5940 shows that TURN misrepresents what the actual words state in DIVCA. Relying on the words of Section 5940 and giving them their usual meaning, as the Commission is required to do, Section 5940 solely prohibits a telephone company from raising the rate for basic residential service to finance the cost of deploying video infrastructure. Setting aside the issue of whether other laws exist that prohibit cross-subsidization, TURN's characterization that Section 5940 prohibits cross-subsidization generally is overbroad; therefore, TURN lacks any foundation to contend that the Commission is required under Section 5940 to adopt regulations intended to monitor cross-subsidization generally.

Furthermore, legislative analysis pertaining to Section 5940 demonstrates that, to the extent the legislature was concerned with cross-subsidization of services, the limitations adopted in Section 5940 were deemed sufficient to address those concerns. In particular, both the Assembly and Senate legislative analyses (9-5-2006 and 8-28-2006, respectively) describe how the DIVCA addresses cross-subsidization issues:

> This bill deals with the potential for cross-subsidization by freezing rates for basic residential telephone service at current levels until 2009, with

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PUC authorized to raise those rates to reflect inflation increases. Additionally, this bill prohibits all telephone companies from raising the price of basic telephone service to finance the cost of providing cable service.

Accordingly, documented legislative intent specifically establishes that DIVCA was not intended to give the Commission general authority to police cross-subsidization concerns and certainly did not contemplate any requirement for state-issued franchise holders to provide highly detailed and disaggregated data, as TURN requests.

The sole trigger that could prompt Commission inquiry under Section 5940 is if a telephone company raises the rate for basic residential telephone service. In D.07-03-014, the Commission determined that extensive reporting requirements are not necessary to determine whether the triggering event occurs. In effect, the Commission has determined that no administrative regulations are necessary to monitor whether rates for basic residential service are raised. The Commission's determination is reasonable, because it does not need to rely on formal reporting requirements to determine whether a company has raised basic residential telephone rates. The Commission has any number of avenues to monitor pricing of basic residential service, not the least of which is the informal complaint process, so that it is not necessary to impose reporting requirements on state franchise holders in conjunction with Section 5940.

As discussed above, the determination of whether administrative regulations are necessary is entrusted to the discretion of the administrative agency.[11] An agency's determination not to adopt regulations is given a strong presumption of correctness; only if the determination not to adopt regulations is arbitrary and capricious will a court have authority to overturn an agency's determination.[12] In this case, the Commission's determination to refrain from imposing the onerous reporting requirements advocated by TURN is reasonable, insulating the determination from any challenge of legal error.

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[11] *Alfaro*, *supra*, 98 Cal.App.4th at 503.

[12] *Id.*

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B. Exempting Video Franchise Applications from Protest is Legally Valid.

TURN and Greenlining allege that the Commission's determination to prohibit protests of video franchise applications is inconsistent with DIVCA. Actually, the Commission's determination is squarely consistent with DIVCA and represents the appropriate policy outcome.

First, nothing in DIVCA mandates a protest right. Section 5840(b) states "The application process described in this section and the authority granted to the commission under this section shall not exceed the provisions set forth in this section." Nowhere in this section does it specify that applications can be protested, and the Commission can do no more than what is specifically required in Section 5840(b). The determination to prohibit protests is consistent with Section 5840(b). In the absence of a mandate to include protests in the application process and even assuming the Commission had the authority notwithstanding the narrow grant of authority in Section 5840(b), the discretion lies with the Commission whether to incorporate a protest right into its application procedures, which, as discussed below, the Commission has reasonably determined should not occur.

Second, the Commission's decision is consistent with the timeframes and information requirements explicitly mandated in DIVCA. Section 5840(h) mandates that the Commission grant a video franchise application as soon as 44 days after it is filed. Furthermore, Section 5840(e) sets forth an easily-verifiable list of information that effectively makes the video franchise application non-discretionary, undermining claims that public protest of such applications is necessary. Based on these factors, the Commission's determination to process video franchise applications without an opportunity for public protest is reasonable and, therefore, legal.

C. The Commission Properly Exercised Its Discretion to Preclude Intervenor Compensation from Video Franchise Proceedings.

The Commission's determination to exclude video franchise proceedings from the scope of its intervenor compensation program is consistent with both DIVCA and the intervenor compensation statutes.

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No provision in DIVCA mandates that participants in video franchise proceedings **shall** be eligible for intervenor compensation. No provision in DIVCA suggests that participants in video franchise proceedings **may** be eligible for intervenor compensation. Focusing strictly on DIVCA, even assuming there is an implied grant of authority to the Commission to award intervenor compensation, which SWT contests, the discretion to determine how to exercise that authority rests with the Commission. Given the Commission's determination to create a level playing field for utility and non-utility providers of video service, the Commission is justified in foregoing an intervenor compensation program that is funded on the backs of utility subscribers only. Because the Commission's decision is not arbitrary and capricious, its decision is legally sound.

TURN and Greenlining contend that the Commission's decision in this regard violates statutes pertaining to intervenor compensation generally.[13] TURN argues that Section 1801.3 only establishes a list of entities (i.e., specific categories of public utilities) for which intervenor compensation must be awarded, but that the intervenor compensation statutes do not prohibit the Commission from expanding the list of eligible proceedings beyond those identified in Section 1801.3. Even accepting TURN's position as valid, all that TURN has established is that the Commission has the discretion to award intervenor compensation in non-utility proceedings. As discussed above, the Commission's discretionary decision not to expand intervenor compensation to video proceedings is entitled to substantial deference.

Notably, DIVCA clearly established in several sections that video providers are not public utilities or common carriers,[14] supporting the Commission's determination to exclude video franchise proceedings from an intervenor compensation program. Additionally, no formal intervenor compensation program existed at the local level. Given the limited role outlined for the Commission in the video franchising process, the Commission certainly has a reasonable basis upon which to refrain from extending intervenor compensation to video proceedings, even assuming that the Commission has authority to award such compensation. However, the more

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[13] *See* Cal. Public Util. Code §§ 1801 *et seq.*

[14] *See* Cal. Public Util. Code §§ 5810(a)(3), 5820(c).

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straightforward conclusion is that the Commission lacks such authority, and including video franchise proceedings in the intervenor compensation program would constitute legal error as action in excess of statutory delegation of power. Accordingly, the Commission's decision is reasonable and does not commit legal error.

IV. CONCLUSION.

Based on the foregoing, the Commission should deny the Applications for Rehearing filed by TURN and Greenlining.

Dated this 19th day of April, 2007, at San Francisco, California.

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CERTIFICATE OF SERVICE

I, Noel Gieleghem, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is COOPER, WHITE & COOPER LLP, 201 California Street, 17th Floor, San Francisco, CA 94111.

On April 19, 2007, I served the following RESPONSE OF SUREWEST TELEVIDEO (U 6324 C) TO APPLICATIONS FOR REHEARING by placing a true and correct copy thereof with the firm's mailing room personnel, for mailing in accordance with the firm's ordinary practices, addressed to the parties on the CPUC service list for Proceeding No. R. 06-10-005.

Copies were also hand delivered to Assigned ALJ Sullivan and Assigned Commissioner Chong.

Copies were also served via e-mail on those parties on the service list who provided an e-mail address.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 19, 2007, at San Francisco, California.

Noel Gieleghem

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